COURT OF APPEAL - SECOND DIST.
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ROBERT N. WILSON, CLERK

NOT FOR PUBLICATION IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARK WEBB,	)	No. B100720
	)	
Plaintiff and Appellant,	)	(Super. Ct.No. BC106570)
	)	
v.	)	
	)	
STATE OF CALIFORNIA DEPARTMENT OF REHABILITATION, et al.	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from an order of the Superior Court of Los Angeles County, Ronald E. Cappai, Judge. Affirmed.

Dale M. Fiola for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Margaret A. Rodda, Senior Assistant Attorney General, Richard J. Rojo, Supervising Deputy Attorney General, and Leonard Pape, Deputy Attorney General, for Defendants and Respondents.

Plaintiff appeals from an order of dismissal entered after defendants' demurrer to the third amended complaint ("TAC") was sustained without leave to amend. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Factual Background

Appellant Mark Webb commenced employment with respondent State of California, Department of Rehabilitation ("Department") on January 4, 1979, as an employment program representative. After promotions, on October 3, 1990, appellant became a teacher with the Department of Corrections.

From March 18 to October 30, 1991, appellant took disability leave for mental depression. Appellant asked to be relieved from the Department of Corrections job because of numerous death threats to himself and his family.[1/] On about July 8, 1991, Dr. Spindell, a psychotherapist, reported appellant exhibited signs of clinical depression (anxiety, depression and somatic symptoms). Appellant alleged clinical depression is a protected emotional and mental disability.[2/]

On or about October 30, 1991, appellant was placed with the Department. On about March 26, 1993, respondents John Millen and Alberto Ramirez informed appellant that effective April 1, 1993, he was going to be involuntarily transferred from the Glendale office to the Van Nuys office. Millen also informed appellant that all the women in the Glendale office were afraid to work with appellant and that he was incapable of handling the case load or working with clients due to his disability.

On about March 10, 1993, appellant came upon the portrait of his daughter's face, which had been disfigured. The portrait was on appellant's desk. Appellant filed police reports with the state and the City of Glendale.

On about March 17, Ramirez asked appellant if he had in fact defaced his daughter's picture "'[b]ecause of your diagnosed mental disability.'" Later, Ramirez asked appellant if he was planning on bringing a weapon into the office.

On about March 26, appellant was informed that all his rehabilitation cases were being removed from his supervision and that he would no longer be handling cases. Since that date,

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1. Previously, appellant alleged that he asked to be released from the teaching job because of the death threats and because he had hurt his back and had carpel syndrome in his wrist. Appellant also alleged he had been on partial disability status from October 1991 and worked "half day of a five day work week."

2. The prior complaints did not allege what the nature of appellant's mental disability was.

appellant only answered the telephone. Later, Ramirez informed appellant he should not be allowed to work with clients given his mental disability. Ramirez made those remarks in the presence of Millen.

Appellant alleged that once his mental disability was disclosed to his co-workers, he suffered discrimination at the hands fellow workers, including respondents Cecilia Mendoza, Judy Robertson and Olivia Thomas (incorrectly named as Olivia Ramirez). Robertson sabotaged appellant's files on two of his clients for two months.

A promotional readiness examination report, dated April 22, 1993, remarked appellant showed "'poor judgment by taking client to San Diego for job interview on a weekend and stayed over night.'" In actuality, appellant took his wife and child to San Diego and stayed with them, not the client.

Appellant alleged Mendoza and Robertson refused to receive messages so that he could return telephone calls and perform other job assignments. Respondent Osie Thornton, Jr. selected less qualified individuals to fill the senior vocational counselor position that appellant had applied for and was the most qualified to fill. Mendoza, Robertson and Thomas complained they did not want to work with appellant because of his mental and emotional disability.

Appellant alleged that the disclosure of his mental disability caused discrimination to occur and created a hostile work environment and that he suffered from repeated acts of disparate treatment.

On June 10, 1993, appellant filed a charge of discrimination with the Department of Fair Employment and Housing ("DFEH"), based on his involuntary transfer to the Van Nuys office and Millen's statements the women were afraid to work with him and appellant was incapable of handling his case load due to his disability.

Appellant alleged he was subject to retaliation, including being denied on September 6, 1994, a senior vocational rehabilitation counselor position in the Los Angeles office, because he had filed a charge of discrimination. Thornton notified appellant he had not been selected for the position. Appellant claimed he was the most qualified person for the position and that Thornton and respondent Nancy Berry had the authority to and did make the selection decision.

On October 7, 1994, appellant filed a charge of discrimination against Thornton based upon retaliation for being denied the promotion.

Appellant alleged other forms of retaliation such as on-the-job harassment, poor performance evaluations, not being given his usual, customary duties, being assigned menial tasks, and other forms of adverse employment actions. Appellant claimed retaliation in the form of: (1) deleting his case record notes

requesting medical records; (2) barring him from making written requests for consumer college transcripts in order to have consumers vocationally tested; (3) blocking him from post review; (4) accusing him of insubordination when he requested certain consumers be specifically evaluated; (5) refusing his request to watch training tapes during work schedule; and (6) being by passed and not contacted to interview for various senior counselor positions that were open; and (7) receiving the lowest possible score on an interview for a specialist position.

Other alleged retaliation included respondents endeavoring to have a psychological evaluation conducted on appellant to ascertain if he was able to perform his job duties with the aim to terminate him and being denied another senior counselor position by Berry.

On November 25, 194, appellant filed a charge of discrimination against Berry for denial of the senior counselor position.

On December 16, respondent Joel Landis backed into appellant's car, and on February 9, 1995, Landis made derogatory remarks about appellant "'being a lousy Christian'" and "' an extortionist.'" As a result, appellant filed an amended charge of discrimination against Landis for the disparaging remarks.

II. Procedural History

On June 9, 1994, appellant filed a complaint alleging nine causes of action. Demurrers were sustained to subsequent amended complaints, which added additional defendants and additional causes of action. The TAC, the operative complaint, alleged three causes of action for disability discrimination, retaliation and injunctive relief. The opening paragraph of the TAC alleged: "This is a Complaint by an employee against the employer for damages arising out of the wrongful transfer of employment. Plaintiff seeks compensatory and punitive damages." The TAC and the second amended complaint ("SAC") were verified in accordance with a court order.

In respondents' demurrer to the TAC, they argued appellant had admitted he was not disabled and thus could not avail himself of remedies for discrimination based upon mental disability and that the individual respondents' conduct was privileged and immune from suit under Civil Code section 47, subdivisions (a), (b) and (c) and Government Code section 820.2. The court sustained the demurrer without leave to amend. Subsequently, the court signed an order of dismissal.

Appellant filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions of conclusions of fact or law. We also consider matters which may be judicially noticed.' Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, thee has been no abuse of discretion and we affirm. The burden of proving such reasonable possibility is squarely on the plaintiff." (Citations omitted.) (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

II. Prior Allegations

In his previous complaints, appellant made various allegations focusing on charges that respondents made false statements that he had a mental disability as hereafter set forth:

1. Original Complaint: The emotional distress cause of action alleged that respondents made "wrongful accusations against Plaintiff that he . . . was mentally unstable" and that the "accusations were unfounded." The cause of action for invasion of privacy alleged it was false that appellant was "mentally imbalanced."

2. First Amended Complaint ("FAC"): It was a "wrongful accusation" that he was "mentally unstable" and the accusation was "unfounded"; there were "false statements" which incorrectly portrayed appellant as "mentally imbalanced"; those "libelous statements referred to an alleged mental disability of Plaintiff"; and those statements were made "with knowledge of its falsity." Those allegations were in the emotional distress and invasion of privacy causes of action.[3]

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3. The invasion of privacy cause of action in the complaint and the FAC was predicated on statements in an April 22, 1993, promotional readiness examination report. The report, which was attached to all the complaints, was missing page 2, which presumably contained the alleged staements. Appellant did not allege the report exaggerated his disability nor quote what the actual statements were.

The discrimination cause of action alleged: "Defendants claimed that Plaintiff had a 'diagnosed mental disability' and labeling it as such disclosed [d] the alleged disability to others.... After other employees were made aware of the alleged 'diagnosed mental infirmity', which Plaintiff claims was libelous and slanderous in nature and invading his right of privacy, co-workers requested that Plaintiff not work in and around them. Such conduct by Defendants created a hostile work environment for Plaintiff and was tantamount to labelling him as mentally deranged. Based upon the mislabeling by Defendants of the severity of the Plaintiff's disability, Plaintiff was subjected to repeated acts of disparate treatment."

3. Verified SAC:[4] The same paragraph quoted above was alleged in the discrimination cause of action.

4. Verified TAC: This pleading omits the prior admissions of the falsity of appellant's "mental disability," but still makes reference to "defamatory remarks made by their employers," but does so without stating was allegedly defamatory. The pleading also omits the allegation respondents mislabelled the severity of appellant's disability.

"If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading" (Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal.2d 713, 716.) ""In such a case the original defect infects the subsequent pleading so as to render it vulnerable to a demurrer."" (Hendy v. Losse (1991) 54 Cal.3d 723, 743.) However, ""a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence."" (Ibid.) The rule applies to unverified complaints. (Pierce v. Lyman (1991) 1 Cal.App.4th 1093, 1109; see also Weil, Cal.Practice Guide: Civil Procedure Before Trial (Rutter 1998) § 6.710.)

As described in the synopsis, the TA contains various allegations pertaining to acts of discrimination or retaliation because of appellant's mental disability. However, by previously alleging that respondents made false accusations that appellant had a mental disability, appellant alleged he did not have a mental disability.

At oral argument, appellant stated:

"If you will understand initially, initially we came in and claimed he had a mental disability but it was

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4. Appellant suggests it was error for the court to order him to verify the SAC and the TAC. Appellant offers no authority in support of that position. Even assuming arguendo it was error for the court to order a complaint to be verified, appellant does not claim the alleged error was reversible nor does he explain how he was harmed because he had to verify the complaints. (See 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal, §§ 408-409, pp. 459-461.)

> exaggerated, blown out of proportion by the dissemination of other information to other personnel, which included supervisors who then said if he has got serious mental problems, I don't want to work with him. [Par] So it is the State who is culpable for exaggerating the scope of his mental disability. He has admitted at all times he has a mental disability. What he's claiming was libelous was the fact they had exaggerated it. If he had clinical depression, you don't say the guy is suffering from schizophrenia. You do that, you have a lot of people who say I don't want to work with this guy if he's schizophrenic. He was improperly labeled, that was the gist of this case. [Par.] The court felt there was an inconsistency. He was either admitting he was disabled or not. In the second amended complaint we admitted he was disabled or not. In the second amended complaint we admitted it was libelous for them to make statements about him that were exaggerated and grossly out of proportion with what his mental disability was."

On appeal, appellant repeats his argument that respondents misunderstood the gist of his complaint. Appellant says he always admitted he suffered from clinical depression, but respondents improperly informed appellant's co-workers that he suffered from schizophrenia. The difficulty is that there is no mention of schizophrenia in any of the complaints, and appellant did not identify the nature of his mental disability as being clinical depression until the TAC. In essence, appellant is attempting to distinguish "mental instability," "mental imbalance" and "mental infirmity" from clinical depression.

The FAC and SAC each contained a single allegation that" "Based upon the mislabeling by Defendants of the severity of Plaintiff's disability, Plaintiff wa subjected to repeated acts of disparate treatment." The FAC, which contains the invasion of privacy claim accusing respondents of making libelous statements referring to appellant's "alleged mental disability," does not allege that those statements exaggerated appellant's mental disability. In the TAC, appellant abandoned any reference to exaggerating the severity of his disability. At the hearing on the demurrer to the TAC, appellant's counsel admitted: "He has a mental infirmity."

Respondents demurred to the TAC on the basis that in the previous complaints appellant had admitted he was disabled. In his written response to that demurrer, appellant did not argue this theory of exaggeration, rather he argued he did not make a fact admission in the prior pleading, but only stated a legal conclusion. Previously, in the demurrer to the SAC, respondents had raised this same point. Despite these warnings, appellant did not argue

the prior allegations were the result of mistake or inadvertence; rather he eliminated the pertinent allegation. The prior allegations of false accusations of mental disability, which must be read into the TAC, rendered the TAC vulnerable to demurrer. Accordingly, the court properly treated the TAC as a sham pleading and properly sustained demurrers to the entire TAC. (Owens v. Kings Supermarket (1988) 198 Cal.App.3d 379, 384.)

Appellant argues that even if he does not have a viable cause of action for disability discrimination, the cause of action for retaliation still remains as he asserted various acts of retaliation following his filing several DFEH charges and he was a member of a protected class. As discussed above, appellant's prior allegations constitute an admission he was not disabled such that he is not a member of a protected class so that cause of action is also not viable.

We need not address other issues raised by the parties. However, in the context of suits by employees against employers, we note that the areas of discrimination, harassment and wrongful termination (and related causes of action) are fraught with peril for the pleader as complaints are often a cauldron of allegations and causes of action with no attempt to match the allegations with the elements of the proper cause of action.

For instance, in this case, in response to an argument that under Janken v. GM Hughes Electronics (1996) 46 Cal.App.4th 55, 64-65, the individual respondents were not liable for acts of discrimination in necessary personnel management actions, appellant argues under Janken and Reno v. Baird (1998) 18 Cal.4th 640, the individual respondents are liable for harassment, but he never asserted a harassment cause of action in any of his complaints.

DISPOSITION

The order is affirmed. Respondents to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

WOODS, J.

We Concur:

LILLIE, P.J.
JOHNSON, J.